

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALLAN MIRACLE,

Defendant-Appellant.

UNPUBLISHED

July 21, 2011

No. 297109

Monroe Circuit Court

LC No. 08-037169-FH

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions of four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and one count of second-degree CSC, MCL 750.520c(1)(a). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 22 ½ to 50 years' imprisonment for each first-degree CSC conviction, and 10 to 30 years' imprisonment for the second-degree CSC conviction. We affirm the convictions, but vacate defendant's sentences and remand for resentencing.

We first address the sentencing issue. Defendant argues that the trial court erred in sentencing him as a third habitual offender under MCL 769.11. Defendant acknowledges that he has two felony convictions other than the CSC convictions at issue here. He argues, however, that because one of his convictions occurred after the offenses at issue, he should have been sentenced as a second habitual offender, rather than as a third habitual offender. This argument presents a question of statutory interpretation that we review de novo. *People v Hornsby*, 251 Mich App 462, 469; 650 NW2d 700 (2002).

MCL 769.11(1) authorizes enhancement of a sentence "if a person *has been convicted* of any combination of 2 or more felonies . . . *and that person commits a subsequent felony* within this state." (Emphasis added.) The plain language of the statute demonstrates that the convictions used to enhance the sentence must precede the commission of the sentencing offense. See *People v Johnson*, 86 Mich App 77, 80; 272 NW2d 200 (1978) (interpreting prior version of habitual offender statute). A prior conviction may be established by any relevant evidence, including information in a presentence investigation report (PSIR). MCL 769.13(5). The PSIR is presumed to be accurate, and a trial court may rely upon factual information therein. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997).

Here, the PSIR does not support the classification of defendant as a third habitual offender. The CSC convictions at issue here arose out of sexual assaults that defendant committed in 2002. Defendant was not convicted of these assaults until 2009. The PSIR indicates that after defendant committed the sexual assaults but before he was convicted, he committed and was convicted of unlawful use of a motor vehicle. The trial court apparently counted the unlawful use conviction to classify defendant as a third habitual offender under MCL 769.11 and sentenced defendant according to the third habitual offender sentencing guideline range. This was plain error. A conviction that occurs after the commission of the sentencing offense is not a prior conviction for purposes of the habitual offender statutes. Because the trial court applied an incorrect sentencing guideline range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

We turn now to defendant's other arguments. Defendant argues that the trial court abused its discretion in admitting the victim's two poems as prior consistent statements. We agree, but find reversal is not required. Preserved evidentiary issues are reviewed for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). An abuse of discretion exists if the results are outside the principled range of outcomes. *Id.* at 588-589. If error is found, reversal is not required unless the defendant meets his burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error, meaning the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Pursuant to MRE 801(d)(1)(B), prior consistent statements are not hearsay if the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Four elements must be met for admission of a prior consistent statement:

'(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.' [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000), quoting *US v Bao*, 189 F3d 860, 864 (CA 9, 1999).]

Defendant admits that the prosecution proved the first two elements required to admit a prior consistent statement because the victim testified at trial, was subject to cross-examination, and there was an express or implied charge of recent fabrication. However, defendant contends that the third and fourth elements were not satisfied because the two poems were not consistent with the victim's testimony that defendant sexually assaulted her, and the record did not reflect that the poems were written before the motive to lie arose.

Regarding the third element, after reviewing the victim's in-court testimony and the two poems that she wrote, we cannot conclude that the poems were prior consistent statements. The poems do not contain factual specifics regarding defendant's sexually assaultive acts against the victim. Although the poems contain general references implying that defendant hurt and later

threatened the victim, they mainly describe the feelings the victim endured after defendant sexually assaulted her. Thus, it was an abuse of discretion for the trial court to admit the poems into evidence as prior consistent statements.

Nonetheless, reversal is not required because the error was not outcome determinative. The victim testified that around July 4, 2002, defendant sexually assaulted her at least five times on three separate occasions by inserting his penis into her mouth, inserting his tongue into her vagina, twice inserting his fingers into her vagina, and licking her breast with his tongue. In addition, the victim's aunt testified that the victim told her that defendant sexually assaulted her. This testimony was sufficient to prove the charged crimes, and thus, the evidentiary error did not result in a miscarriage of justice. *Lukity*, 460 Mich at 495.

Defendant next argues that the admission of other acts evidence violated the corpus delicti rule. We disagree. We review the unpreserved corpus delicti challenges for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763. For a plain error to affect the defendant's substantial rights, the error must be prejudicial, meaning it must have affected the outcome of the proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). The defendant bears the burden of showing prejudice. *Id.*

The prosecution must present proof of the corpus delicti of an offense before a defendant's inculpatory statements are admissible. *People v Schumacher*, 276 Mich App 165, 180; 740 NW2d 534 (2007). "In order to establish the corpus delicti of a crime, the prosecution must introduce evidence from which a trier of fact reasonably may find that acts constituting all the essential elements of the crime have been committed and that someone's criminality was responsible for the commission of those acts." *People v Hamp*, 110 Mich App 92, 96-97; 312 NW2d 175 (1981).

Here, a police officer testified about defendant's written confession in a prior CSC case involving a different victim. Defendant argues that the corpus delicti rule rendered the officer's testimony inadmissible, because there was no proof he committed the crime against the other victim. We question defendant's characterization of the officer's testimony as an admission by defendant for purposes of the corpus delicti rule in this case. Even assuming the corpus delicti rule applies to the officer's testimony, we conclude that the prosecution presented sufficient proof of the crime against the other victim. The officer testified that the other victim alleged that defendant forced her to perform felatio. Additionally, defendant pleaded guilty to second-degree criminal sexual conduct against the other victim. Thus, the prosecution presented proof of the crime against the other victim before introducing defendant's inculpatory statements regarding the other victim's case.

Defendant argues that the other acts evidence was not relevant pursuant to MRE 404(b) or MCL 768.27a. We disagree. Unpreserved claims of evidentiary error are reviewed for plain error affecting substantial rights. *Jones*, 468 Mich at 355.

MRE 404(b)(1) provides:

[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may,

however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), other acts evidence 1) must be offered for a proper purpose, 2) must be relevant, and 3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *Knox*, 469 Mich at 509. ““Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence.”” *People v Dobek*, 274 Mich App 58, 86; 732 NW2d 546 (2007), quoting *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

MCL 768.27a(1) provides:

[n]otwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

Under MCL 768.27a, if a defendant is accused of committing a listed offense against a minor, the prosecution may present evidence that the defendant committed another listed offense against a minor without justifying the admissibility of the evidence under MRE 404(b). *People v Watkins*, 277 Mich App 358, 364; 745 NW2d 149 (2007); *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). Furthermore, the prior acts may be admitted for any relevant purpose, including proof of the defendant’s propensity to commit the charged offense. *Watkins*, 277 Mich App at 364-365; *Pattison*, 276 Mich App at 619; MCL 768.27a. However, the trial court must still determine whether evidence that is admissible under MCL 768.27a should nevertheless be excluded because its probative value is substantially outweighed by unfair prejudice pursuant to MRE 403.¹ *Pattison*, 276 Mich App at 620-621.

The trial court properly determined that the other acts evidence was relevant, and therefore admissible, pursuant to MCL 768.27a. The other acts evidence was properly

¹ MRE 403 provides, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

admissible to show a common plan or scheme involving defendant's misuse of his position of authority over young girls for sexual gratification. It was relevant because it tended to make a material fact, whether defendant sexually assaulted the victim, more probable. Finally, the probative value of the other acts evidence substantially outweighed any prejudicial effect because the alleged other act tended to highlight how defendant abused his position of authority to achieve sexual gratification. Additionally, the other acts evidence was admissible because it was relevant to show defendant's propensity to abuse his position of authority over young girls for his sexual gratification. Thus, it was not an abuse of discretion for the trial court to admit the other acts evidence.

Defendant argues that MCL 768.27a violates the ex post facto clause and is unconstitutional. We disagree. This Court has determined that MCL 768.27a does not violate the ex post facto clause. *Pattison*, 276 Mich App at 619.

Defendant, in his standard 4 brief, argues that his right to due process was violated by prearrest delay. We disagree. We review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 761-764.

Dismissal of charges is merited when a prearrest delay has resulted in actual and substantial prejudice to the defendant's right to a fair trial and the prosecution intended the prearrest delay as a tactical advantage. *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009). "Substantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charge in a manner that the outcome of the proceedings was likely affected." *Id.* To determine whether a defendant's due process rights were violated, the court must balance the defendant's interest in a prompt adjudication of the case against the prosecution's interest in delaying the prosecution. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). Defendant first bears the burden of coming forward with evidence of prejudice resulting from the delay. *Id.* The guideline is whether "the record presents evidence of prejudice resulting from the delay which violates a defendant's right to procedural due process." *Patton*, 285 Mich App at 236, quoting *People v Anderson*, 232 Mich App 128, 135; 591 NW2d 44 (1998). If the defendant meets his burden of establishing prejudice, then the prosecution has the burden of persuasion, and it must prove that the reasons for the delay were sufficient to justify the prejudice. *Cain*, 238 Mich App at 108.

Although defendant presents the names of eight witnesses and summarizes what he believes the witnesses' testimony would have been, defendant has failed to prove that the prearrest delay prejudiced him. Defendant's assertions are mere generalized allegations that are not supported by the lower court record. Furthermore, defendant failed to offer any evidence, such as the witnesses' affidavits, to support his contentions. *Patton*, 285 Mich App at 237. Moreover, defendant presented no evidence that the prearrest delay was orchestrated by the prosecution in an attempt to gain a tactical advantage. Rather, the prosecution had good cause for the prearrest delay because it was still investigating the case. See *People v Herndon*, 246 Mich App 371, 390-391; 633 NW2d 376 (2001). Defendant has failed to meet his burden and has not established actual and substantial prejudice. Defendant was not denied due process because of prearrest delay.

Defendant also argues in his standard 4 brief that his constitutional right to a speedy trial and the statutory 180-day rule were violated. We disagree. Whether a defendant was denied a speedy trial is a mixed question of fact and law. *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009). The trial court's factual findings are reviewed for clear error, while the constitutional issue is a question of law that is reviewed de novo. *Id.* Also, this Court must determine whether any error was harmless beyond a reasonable doubt. *Id.* Additionally, whether the 180-day rule applies is a question of law this Court reviews de novo. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003).

The United States and Michigan Constitutions guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20. In determining whether a defendant has been denied this right, this Court applies a four-part balancing test. *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006). The four-factors are: “(1) the length of the delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant.” *Id.* The fourth factor is critical to the analysis. *Cain*, 238 Mich App at 112. If the total delay is less than 18 months, then the burden is on the defendant to show that he suffered prejudice. *Id.* The delay period begins with the date of the defendant's arrest until the time that trial commences. *Williams*, 475 Mich at 261.

Defendant was arrested for the charged offenses on August 7, 2008, and his trial commenced on September 14, 2009. This resulted in an approximately 13 month delay of trial, and thus, the delay was not presumptively prejudicial, and the burden is on defendant to show that he suffered prejudice. *Cain*, 238 Mich App at 112. Defendant fails to provide any evidence of prejudice and merely asserts that the burden is on the prosecution because a 34 month delay occurred. Defendant incorrectly calculates the delay period from the 2007 issuance of the warrant and complaint. However, as previously noted, the delay period does not begin until the date of defendant's arrest. *Williams*, 475 Mich at 261. Thus, defendant's assertion that the burden is on the prosecution to provide a reason for the delay is without merit. Moreover, because this factor weighs in favor of the prosecution, this Court need not examine the remaining factors. *Id.* Defendant's constitutional right to a speedy trial was not violated.

Under the statutory 180-day rule, an incarcerated defendant must be brought to trial within 180 days of the date that the Department of Corrections (DOC) provides the prosecution with written notice and a request for final disposition. MCL 780.131(1); MCR 6.004(D). To trigger the rule, the DOC must send written notice and a request for final disposition to the prosecution in the exact manner provided for within the statute. *Williams*, 475 Mich at 254-256. Additionally, MCL 780.131 imposes the 180-day rule only when the defendant is incarcerated with the DOC, and it does not apply to time spent in a county jail. *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). The record is silent regarding when or if the DOC sent written notice to the Monroe County Prosecutor's Office (MCPO) requesting a final disposition. Furthermore, defendant failed to offer any evidence that the DOC sent written notice to the MCPO and admits that he is unaware of the DOC sending written notice to the MCPO. Because there is no evidence that the exact written statutory notice was received by the MCPO from the DOC, the 180-day rule was not triggered, and therefore, it was not violated.

Likewise, defendant claims that because the complaint was filed in January 2007, but he was not arraigned until August 2008, the 180-day rule was violated, and the trial court did not

have jurisdiction over defendant. This argument is without merit. As previously discussed, the 180-day rule is not triggered until the DOC provides the prosecution with written notice and a request for final disposition, *Williams*, 475 Mich at 254-256, thus, the 180-day rule was not violated.

Finally, defendant, in his standard 4 brief, argues that he was denied the effective assistance of counsel. We disagree. A defendant who believes that trial counsel's performance was ineffective should raise the issue in a motion for a new trial or for an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). When the trial court has not addressed the ineffective counsel allegation, this Court's review is limited to mistakes that are apparent from the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's actions constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

Defendant argues that defense counsel failed to adequately investigate or prepare for trial and that he failed to present evidence of defendant's alibi defense. Additionally, defendant argues counsel was ineffective because he failed to endorse and/or produce several witnesses. The failure to present evidence only rises to ineffective assistance if the defense is deprived of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Likewise, decisions on whether to call or question witnesses are presumed to be matters of trial strategy that will not be second-guessed on appeal. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Thus, the failure to call witnesses constitutes ineffective assistance of counsel only when it deprives defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Also, the failure to mount a reasonable investigation may constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

In reviewing the existing record, defendant has not proven that counsel's failure to investigate by not visiting defendant until 13 days before trial, prepare an alibi defense, or call several witnesses, constituted deficient performance because the existing record provides no basis for concluding that defendant was denied a substantial defense. Counsel competently cross-examined the prosecution's witnesses and presented two witnesses who testified that defendant was at the hospital the night of his son's birth. Moreover, the record reveals that the several witnesses were all unavailable at the time of trial. Defense counsel could have had numerous strategy reasons for focusing on the cross-examination of the prosecution's witnesses and presenting only two witnesses on defendant's behalf, including the need to show that the victim's testimony was not credible and to maintain consistency in defendant's defense theory. Furthermore, given the evidence against defendant, as previously discussed, any deficiency in counsel's performance did not prejudice defendant.

Defendant contends that defense counsel was ineffective for failing to object to the police officer's testimony that the prior victim in another case tested positive for chlamydia. Declining to raise objections to evidence can be sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). In reviewing the existing record, defendant has not proven that counsel's failure to object to the testimony was deficient performance. As previously discussed, the other acts evidence was properly admitted into evidence, and thus, it would have been fruitless for defense counsel to object. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002) (counsel is not ineffective for failing to make a futile objection).

We acknowledge defendant's submission of the Attorney Discipline Board's notice of suspension and restitution of his trial counsel, issued October 19, 2010. Nothing in the notice references defendant's case. Defendant has not overcome the presumption that counsel's actions constituted sound trial strategy, thus, defendant has not established that a new trial is warranted. Furthermore, given the evidence against defendant, as previously discussed, any deficiency in counsel's performance did not prejudice defendant.

Convictions affirmed, sentences vacated, and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto